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In the Supreme Court of the United States

OCTOBER TERM, 1940.

No. 187.

FRANK G. RATH,
Individually and as President of Hotel and Restaurant Employees' International Alliance, Cooks' Local Union No. 167, *et al.*,
Petitioners,

vs.

PEARL E. CROSBY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

I.

STATEMENT OF THE CASE.

Petitioners' "Summary Statement Of Matter Involved" omits many important facts found by the Supreme Court of Ohio. (R. 430.) Hence we make a rapid summary of the facts, documented by specific reference to the record.

(a) Respondent, Her Business, and Her Employees.

Respondent conducts a restaurant in Cleveland, Ohio, in which she has invested about $35,000.00 (R. 282), and for which she has built up a valuable trade and good will. (R. 283.) She employs approximately forty-five employees in all departments and many of them have been with her almost since the time she opened her restaurant about eleven years ago. (R. 283.)

None of the respondent's employees is a member of any union (R. 40), and none of them desires to become a member of any union or of petitioners' unions. (R. 122, 130, 272.) In fact, respondent's colored cook testified that in 1933 he tried to join Cooks' Union No. 167 and was refused admission because of his color and that of forty or fifty colored cooks and three or four hundred colored waiters in Cleveland he knew of none that belonged to the unions. (R. 47, 48.)

There was no evidence whatever that the respondent had been anti-union in the conduct of her business. She made no inquiries of her employees as to union affiliation and made no such inquiries of applicants for work. (R. 284.) There was no evidence that any person had ever been refused employment by her because of union membership or that anyone had ever been discharged because of such membership. Respondent's relations with her employees have always been amicable and free from controversy. (R. 294.) There is no restaurant in the respondent's neighborhood similar to the respondent's where members of the petitioners' unions are employed and which is in competition with respondent's restaurant. (R. 412, 413.)

(b) The Demands of the Petitioners.

In August and September, 1937 the petitioners' unions demanded that respondent sign a closed union shop agreement with them. (R. 287, 288.) She inquired whether the petitioners' unions were authorized to represent any of her employees and they answered in the negative. The petitioners insisted, however, that respondent either force her employees to become members of their unions or that she discharge them and hire union members in their places. This the respondent refused to do. (R. 288.) That was the only demand ever made on respondent. It was the only demand refused. (R. 217, 218.) Wages, hours, and working conditions were never mentioned.

Thereupon the petitioners combined to force respondent to comply with their demands. Their purpose was to cause such injury to the respondent's business that she would be compelled to coerce her employees against their wills to appoint the petitioners' unions as their bargaining agents or, in the alternative, that she would be compelled to discharge her employees and replace them with members of the petitioners' unions. (R. 217, 218.)

(c) Petitioners' Attack upon Respondent Before the Temporary Order.

On October 4, 1937, the petitioners made their first show of force, calculated to intimidate the respondent, her employees and her customers. From fifty to seventy-five pickets congregated in front of respondent's restaurant. (R. 42.) There were forty or fifty pickets at noontime and from seventy to one hundred in the evening at dinner time, and such numbers were continued until the day of the temporary injunction. (R. 343.)

These pickets intimidated, frightened and assaulted respondent's employees, breaking the jaw of one so that he was laid up for seven weeks, and injuring another so that he was laid up a week. (R. 44.) They called the respondent's employees disgraceful names. (R. 289.) They carried banners, designating the respondent's restaurant as "unfair" and calling upon the public not to patronize it. (R. 78.) They used epithets of insult against the colored race to which several of respondent's employees belong. (R. 43.) In loud voices they called upon members of the public not to patronize respondent's restaurant. (R. 77.) They walked in a moving circle in front of the entrance and blocked it. (R. 76.) They stopped all deliveries of merchandise to respondent's restaurant (R. 351), and they made disparaging remarks about the respondent's food. (R. 385.)

On October 11, 1937 the Court of Common Pleas issued a temporary restraining order (with the consent of the petitioners), prohibiting violence, intimidation and mass picketing but permitting two pickets, all until final hearing.

(d) Petitioners Continued the Attack upon Respondent Even After the Temporary Order.

The violence, intimidation and threats, however, were continued by the defendants after and in violation of this temporary order. The pickets continued to call the respondent's employees vile names. (R. 77, 131.) Customers were threatened. (R. 112, 149.) Respondent's home was picketed during the night time. (R. 274.) Customers who drove to respondent's restaurant returned to their cars to find their tires punctured. (R. 221.) The homes of respondent's customers were stench bombed. (R. 117.) A dynamite bomb was set off in the yard of respondent's former residence, that address still appearing in the city directory. (R. 261.) Soon thereafter an attempt was made to dynamite respondent's present residence. (R. 258, 296.) Respondent's restaurant was stench bombed on two occasions. (R. 240.) The home of one of the employees was stench bombed. (R. 337.) A delivery driver was threatened and called obscene names. (R. 109.) A truck driven by a union truck driver who had made a delivery was seized and partially burned. (R. 165, 166.)

Each of respondent's employees renders his or her services pursuant to the terms of a renewable, written, three-month contract (R. 430), the validity of which was sustained by all the Ohio courts. (R. 432.)

By the attack, respondent's business was reduced 66⅔%. (R. 324.)

Petitioners specifically admit their purpose to continue their attacks against the respondent despite the contracts with the employees and unless restrained. (R. 217, 218.)

II.

SUMMARY OF ARGUMENT.

We respectfully submit that certiorari should be denied in this case for the following reasons:

A. No federal question was either presented to or decided by the state court.

B. The judgment of the state court is based on non-federal grounds adequate to support it, namely,

(1) That no legitimate trade dispute existed.

(2) That respondent's employees were bound by valid employment contracts.

(3) That the picketing was accompanied by excessive violence.

C. The federal question raised in this petition is not substantial, since the case turned on a point of local law as to which the state court's jurisdiction is paramount.

III.

ARGUMENT.

A. No Federal Question Was Either Presented to or Decided by the State Court.

Rule 38 adopted by this Court (Revised Rules, effective Feb. 27, 1939) embodies in it the ingredients which this Court has long deemed essential to the exercise of its jurisdiction to review state court decisions. The petition must show affirmatively, by specific reference to the record, that a federal question was presented for decision to the highest court of the state, that a decision of the federal question was necessary to the determination of the cause, and that the federal question was actually decided.

Lynch v. New York, 293 U. S. 52 (1934).

Rule 38 specifically requires, by reference to Rule 12, documented proof of the fulfillment of these requirements. The record here shows that the petitioners have failed to

satisfy these prerequisites in any respect whatever. The "Statement as to Jurisdiction" in the petition shows how the petitioners strained to meet the requirements and how signally they failed. Thus, they say that "with respect to the Federal question of free speech" the majority of the Ohio Supreme Court adopted language from an Illinois case which the petitioners quote and italicize. But a cursory examination of the Ohio majority opinion shows, beyond cavil, that the Illinois case was merely cited in support of the "generally accepted rule" (R. 433) against interference in the absence of a legitimate trade dispute. The majority opinion itself does not even mention free speech, nor does it make any reference whatever to the federal constitution.

Petitioners therefore resort to two separate dissenting opinions. Judge Day is quoted as declaring in his dissenting opinion that,

> "peaceful picketing * * * is * * * protected by the constitutional provision governing the exercise of free speech." (R. 434.)

Assuming that such a statement, without qualification as to the purpose sought to be ahieved or the truthfulness of the banners, is good law, it can be adequately rested on the state's own constitution (Art. I, Sec. 11, Ohio Constitution), without reference to the federal constitution. This Court has said that where a state constitution contains a clause similar to one in the federal constitution, a claim of right which does not specifically refer to the federal constitution is deemed to refer solely to the state constitution.

Gibbes v. Zimmerman, 290 U. S. 326, 328.

Judge Zimmerman is quoted by petitioners as saying in his dissenting opinion substantially the same thing as did Judge Day. But that against cannot be distorted into a positive statement by him that he rested his dissent on the federal constitution. He, too, fails to mention the fed-

eral constitution and he, too, could well have meant the state constitution. True, he cites *Senn v. Tile Layers Protective Union,* 301 U. S. 468, 478, as an authority, but so far as appears, he is using the case merely as persuasive authority supporting a general statement of law and not as controlling authority compelling his decision. Moreover, his reference to "free speech" comes at the end of a long opinion in which he states, as the real ground for his dissent, his preference for the New York rule, which gives to the concept "labor dispute" a "broader and more comprehensive meaning than the one given it by the majority of this court." (R. 437.)

The paragraph in his dissenting opinion containing the reference to free speech is actually only a side remark showing the reasons given by *other courts* for denying injunctions. Thus, the paragraph starts with the clause, "The opinion has also been advanced" etc. (R. 439.)

Finally the petitioners list five cases ranging from *Insurance Co. vs. Cohen,* 234 U. S. 123 to *Carlson vs. California,* 84 L. Ed. (Adv.) 668, which, they say, "are believed to sustain jurisdiction." Apparently petitioners do not feel firmly entrenched in this belief. These cases announce a proposition that is no longer debatable, namely, that the "due process" clause of the Fourteenth Amendment affords protection against arbitrary abridgment of free speech by state governments similar to the protection given by the First Amendment against action of the federal government. These cases, however, do not dispense with the requirements of Rule 38.

The record here, therefore, establishes without possibility of contradiction that the federal question now asserted was neither raised nor decided at any stage of the proceedings. No reference to the federal constitution appears in any of the pleadings. (R. 1, 14, 17.) It does not appear in the petitioners' motion for new trial or in their notice of appeal. (R. 18.) No mention of it is contained in

the judgment of the trial court. (R. 20.) In his opening statement to the trial court petitioners' counsel expressly says that he claims the right to picket because of

> "the law as it is written definitely in and from this County and has never been repealed or amended in any other court decision." (R. 37.)

The judgment of the Court of Appeals contains no reference to the federal constitution. (R. 426.) The majority of the Ohio Supreme Court neither considers, nor discusses, nor decides any constitutional question. To the contrary, the majority opinion states the problem before it for consideration as follows:

> "The controlling question in the case is whether the evidence discloses the existence of a legitimate trade dispute." (R. 432.)

What is more, the Ohio Supreme Court does not consider constitutional questions unless they are first submitted to or decided by the Court of Appeals.

Hoffman v. Staley, 92 O. S. 505 (1915).

The rule in Ohio is that the syllabus of the Supreme Court states the law of the case. Matters outside the syllabus are not regarded as decision, and expressions in an opinion of views on questions not contained in the syllabus are merely the personal opinion of the particular judge.

State ex rel. vs. Edmondson, 89 O. S. 93, 107, 105 N. E. 269 (1913);

Thackery v. Helfrich, 123 O. S. 334, 175 N. E. 449 (1931).

There is no syllabus in the instant case, but in the absence of a syllabus the points considered or decided are found in the headnotes. Here the headnotes read as follows:

> "Injunction—Labor Unions—Picketing and Boycotting Enjoined—No Legitimate Trade Dispute Existed." (R. 430.)

Not a word in the headnotes about the federal constitution or any federal question.

Finally, the two Illinois cases cited by petitioners, wherein this Court granted certiorari, afford petitioners no comfort. In each one it is apparent that the union specifically urged the Fourteenth Amendment in support of its claims and that the court expressly passed on the question adversely to the federal claim.

We therefore believe it to be conclusively demonstrated that the petitioners have failed to bring this case within Rule 38 and hence this Court has no jurisdiction to review the state court decision.

B. The Judgment of the State Court is Based on Non-Federal Grounds, Adequate to Support It.

(1) That No Legitimate Trade Dispute Existed.

It is well settled that even "where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based and the ground independent of a federal question is sufficient in itself to sustain, this Court will not take jurisdiction."

Lynch vs. New York, 293 U. S. 52, 54.

It is the settled policy of this Court not to pass on constitutional questions that are not clearly necessary to a decision of the case.

Honeyman vs. Hannan, 300 U. S. 14.

This is not an action where there is uncertainty as to what the state court actually decided, nor have supervening changes occurred since the entry of the judgment. Cf. *Minnesota vs. National Tea Co.,* 84 L. Ed. (Adv.) 571 (1940). The Ohio court here explicitly assumed "the controlling question in the case" to be the determination of the state's common law on the point in controversy. It found, after a review of its own earlier decisions, and an examina-

tion of the treatment of that problem by other states, that "no legitimate trade dispute existed."

This Court has said that a decision of a state court restraining a union from placing complainant's company on an "unfair list" does not require any discussion of constitutional questions and does not raise any question of free speech,

> "but involves the power of a court of equity to enjoin the defendants from continuing a boycott which, by words or signals, printed or spoken, caused or threatened irreparable damage."
>
> *Gompers vs. Bucks Stove & Range Co.*, 221 U. S. 418 (1911).

We shall discuss more fully, under our next main heading, the proposition that the question presented here is essentially one of local law.

(2) That Respondent's Employees Were Bound by Valid Employment Contracts.

The Ohio Supreme Court said (R. 432):

> "The question as to the validity of the three month, written, renewable employment contracts here involved requires no discussion. Obviously the Court of Common Pleas and the Court of Appeals held them valid, and a study of the record disclosed nothing tending to support the contention of the defendants to the contrary."

Plainly the petitioners' acts were calculated to interfere with the performance of the employees' contracts and to induce the breach thereof by the employees or by the employer. Petitioners' picketing, threats and violence, which coerced respondent's customers from patronizing her restaurant, were calculated to cause a breach of these employment contracts. Petitioners conceded that it was their purpose to coerce respondent into compelling her employees to designate the petitioners as their bargaining agents or to discharge and replace them with union members.

Under their contracts respondent's employees were free to join the unions or not to join them, but the contracts did not give respondent the right to coerce her employees into joining the union or into relinquishing their individual rights to bargain for themselves.

The petitioners had full notice of the existence of these contracts and are chargeable with the natural consequences of their acts. It is good common law in Ohio, as it is elsewhere, that it is illegal to persuade another to break a valid contract for a definite period of time.

LaFrance v. Electrical Workers, 108 O. S. 61, 94 (1923);

Hamilton Tailoring Co. vs. Joint Board, 132 O. S. 259.

Since the Ohio Supreme Court found these contracts valid, picketing calculated to induce a breach of these contracts was clearly aimed at an illegal objective and was therefore illegal.

(3) Picketing Was Accompanied by Excessive Violence.

The opinion of the Ohio Supreme Court (R. 431) reviews the history of the violence, threats and intimidation practiced upon the respondent, her employees and her customers. The record sustains the court's statement and the petitioners' connection with it, both before and after the preliminary restraining order, by the overwhelming evidence which we have documented in our statement of the case herein. That there was a threat of the continuation of such conduct is evidenced further by the fact that both the trial court (R. 20) and the Court of Appeals (R. 426) enjoined, among other things, assaults, disorderly conduct, intimidation, coercion, interference with deliveries, threats against persons dealing with respondent, and similar acts of molestation.

We therefore do not have here a case of general expressions of opinion or of mere dissemination of informa-

tion, but we have a long record of violence, coercion and intimidation accompanying the alleged dissemination of information, each forming an integral part of a course of illegal activities. The whole is so interwoven that any attempt to label part harmless and part coercive is doomed to failure. As Mr. Justice Holmes so aptly remarked in *Swift & Co. v. United States,* 196 U. S. 375,

> "It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as parts of a single plan, and the plan may make the parts unlawful."

Under these circumstances even courts whose definition of a "labor dispute" the petitioners advocate and prefer to that of the Supreme Court of Ohio have consistently held that the privilege of picketing is lost by its abuse.

Nann v. Raimist, 255 N. Y. 307, 174 N. E. 690 (1931).

And even the benefits of a special statute enacted to protect a union in the enjoyment of its right to peaceful picketing are thereby forfeited.

Busch Jewelry Co. vs. United Retail Employees Union, 281 N. Y. 150 (1939).

The judgment in the instant case can therefore be adequately supported on this clearly non-federal ground alone and one concurring judge expressly placed it on that ground, saying:

> "In respect to the plaintiff's place of business the defendants have therefore forfeited whatever rights they might otherwise have had peaceably to picket under the law. Rights peaceably exercised will be protected by the courts but such protection is forfeited when the attempted exercise thereof is accompanied by acts of violence as in the instant case." (R. 434.)

C. The Federal Question Raised in this Petition is Not Substantial, Since the Case Turned on a Point of Local Law as to Which the State Court's Jurisdiction is Paramount.

Even in the cases where this Court has discretion to grant certiorari, it will not grant a petition, though a state court may have decided a federal question, unless the question is one of substance not theretofore determined by this Court, or unless the state court's decision is not in accord with the applicable decisions of this Court. Rule 38 (5) (a). The Ohio court here decided a state, not a federal, question. Its decision is not at variance with the prior decisions of this Court and is in accord with the majority view of the courts of other states.

Petitioners' thesis appears to be that there is an absolute right to picket because there is an absolute right of free speech. This position finds no greater support in the authorities than an employer's position that he has an absolute right of property in his business. The decisions of this Court, that peaceful picketing may not be *forbidden* indiscriminately and under all circumstances, do not establish that it must be *permitted* indiscriminately and under all circumstances. These freedoms are not absolute but they are subject to restraint by the legitimate exercise of powers vested in state legislatures and courts. The question for determination is the extent of permissible exercise of these powers by such governmental bodies.

It has long been settled that one who intentionally injures another's business *prima facie* commits a tort. *A fortiori* is that true when several conspire to inflict damage because of their greater capacity for harm. To escape liability the petitioners must therefore justify by showing an over balancing public policy on their side. Failure to justify outlaws all means that they use to carry out their conspiracy, even those that are otherwise innocent or constitutionally protected. Mr. Justice Holmes stated the

principle clearly in *Aikens vs. Wisconsin,* 195 U. S. 194 (1904):

> "It would be impossible to hold that the liberty to combine to inflict such mischief even upon such intangibles as business or reputation was among the rights which the Fourteenth Amendment was intended to preserve. * * * No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot, neither its innocence nor the constitution is sufficient to prevent the punishment of the plot by law."

It is now generally accepted that the existence of a legitimate labor dispute justifies a union in the infliction of harm on an employer if lawful means are used. However, there is a wide disagreement among the various state courts in defining the legitimate objectives, in delimiting the area of conflict, and in designating who are strangers to the controversy and who are so closely related to it that they may lawfully be pulled into the arena.

Writers who considered the rationale of anti-injunction legislation posed the problem as follows:

> "It is an attempt to recognize frankly that the central problem of the law of industrial relations is to determine the purposes that justify combination of laborers by marking the outposts of the concept of 'self-interest.'"
>
> *Frankfurter & Green, The Labor Injunction,* p. 215.

The choice of alternatives requires the weighing of the social and economic factors in the particular community. This function is best left to local tribunals. This Court has recognized that differences would develop among local tribunals and has honored such differences. In the words of Mr. Justice Brandeis' dissent in *Truax vs. Corrigan,* 257 U. S. 312, 354:

"What methods and means are permissible in this struggle of contending forces is determined in part by decisions of the courts, in part by acts of the legislatures. The rules governing the contest necessarily change from time to time. Future conditions change and, furthermore, the rules evolved, being merely experiments in government, must be discarded when they prove to be failures, * * * the divergence of opinion in this difficult field of government action should admonish us not to declare a rule arbitrary and unreasonable merely because we are convinced that it is fraught with danger to the public weal and thus close the door to experiment within the law. * * * Judges being thus called upon to exercise a quasi legislative function and weigh relative social values, naturally differ in their conclusions on such questions."

Mr. Justice Brandeis then used language advocating acceptance of the decision of the Supreme Court of Arizona which, in the converse, may well apply to our case. He said:

"In deciding these three points the Supreme Court of Arizona made a choice between well established precedents laid down on either side by some of the strongest courts in the country. Can this court say that thereby it deprived plaintiff of his property without due process of law? * * * A state * * * surely does not lack the power to select for its citizens that one of conflicting views on boycott by peaceful picketing which its legislature and highest court consider will best meet its conditions and secure the public welfare."

Once it has been determined by the proper court that the combat has left the confines of the permissible area, all means employed to carry it on may be properly forbidden. So this Court said in *Gompers vs. Bucks Stove and Range Co.*, 221 U. S. 418:

"But whatever the requirement of the proper jurisdiction as to the conditions on which the injunction against a boycott may be issued, when these facts exist, the strong current of authority is that publication

and use of such letters, circulars and printed matter may constitute a means whereby a boycott is unlawfully continued and their use for such purpose may amount to a violation of the order of injunction."

Thus a strike "to collect a stale claim due to a fellow member of the union, who was formerly employed in the business, is not a permissible purpose" and a legislature may make such action punishable. Mr. Justice Brandeis said in that case:

> "Neither the common law nor the Fourteenth Amendment confers the absolute right to strike."
>
> *Dorchy vs. Kansas,* 272 U. S. 306 (1926) annotated in 71 L. Ed. 248.

Even the New York courts that have established the widest boundaries for this area of conflict have concurred in the prohibition whenever the limits fixed by it have been transgressed.

Peaceful picketing was enjoined, though it was unaccompanied by violence or misstatements and despite a broad statutory definition of "labor dispute," where its purpose was to compel the complainant to hire help that he did not need.

> *Dubrow Pure Food, Inc. vs. Glazel,* 263 N. Y. 589, 189 N. E. 712 (1933);
>
> *Luft vs. Flove,* 270 N. Y. 390, 1 N. E. (2) 369 (1936);
>
> *Thompson vs. Boekhaut,* 273 N. Y. 390, 7 N. E. (2) 674 (1937).

Or where the purpose was to punish the complainant for employing a rival union.

> *Canepa vs. John Doe,* 277 N. Y. 52 (1938).

This Court has said that the states are free to broaden by statute the definition of a "labor dispute" beyond the meaning recognized at common law and to include persons who do not stand in the employer-employee relationship.

Senn vs. Tile Layers Protective Union, 301 U. S. 468 (1937);

Lauf vs. Shinner & Co., 303 U. S. 323 (1938).

Similarly this Court construed the Norris-LaGuardia Act as including racial controversy within the definition of "labor dispute,"

New Negro Alliance vs. Sanitary Grocery Co., Inc., 303 U. S. 552 (1938)

though the common law rule generally was that such controversies did not justify picketing. 48 *Harv. L. Rev.* 691 (1935).

But the *Senn* case (*supra*) expressly recognized that it was for the state to determine the lawfulness of the union's objectives. The court said,

> "Whether it was wise for the state to permit the unions to do so is a question of its public policy—not our concern. The Fourteenth amendment does not prohibit it."

Apparently Wisconsin was not satisfied with the breadth of its original definition and therefore repealed the act and substituted a narrower definition of "labor dispute" requiring that it must be between an employer and a majority of his employees.

Ch. 57, Wisconsin Laws of 1939, effective May 4, 1939.

Thornhill vs. Alabama, 84 L. Ed. (Adv.) 659 and *Carlson vs. California,* 84 L. Ed. (Adv.) 668, disclose no intent on the part of this Court to change the foregoing well established rules. This Court has merely upset sweeping prohibitions against all forms of picketing regardless of their nature and purpose. It has ruled that peaceful picketing cannot be curtailed by a blanket prohibition under all circumstances, in vague and comprehensive legislation. The Alabama statute was condemned in the *Thornhill* case because it had to be "judged upon its face" • • •

since * * * "the courts below expressed no intention of narrowing the construction put upon the statute by prior state decisions." The Alabama courts had so construed and applied the statute that it left

> "room for no exceptions based upon either the number of persons engaged in the proscribed activity, the peaceful character of their demeanor, the nature of their dispute with an employer, or the restrained character and the correctness of the terminology used in notifying the public of the facts of the dispute."

Likewise the California ordinance in the *Carlson* case was judged on its face and its terms were found so "sweeping and inexact" as to "disclose the threat to freedom of speech inherent in its existence." Neither on their facts nor in their language do these two cases exclude from the "allowable area of state control" the right of a state to adopt a reasonable definition of "labor dispute."

The Fourteenth Amendment is not a guarantee of untrammelled freedom of speech under all circumstances. The petitioner here would be the first to press this point if we were dealing with the constitutionality of the restraints imposed upon an employer's freedom of speech under the Wagner Act.

In our dual system of government this Court has indicated its purpose of leaving to local authorities matters of local concern and within local competence. Within large bounds the states are left free to develop their own ideas of government.

> "A prudent self restraint is called for at such times if state and national functions are to be maintained in stable equilibrium."
>
> *Hawks vs. Hamill*, 288 U. S. 52, 61 (1933).

The definitions of "boycott" and "labor dispute" have been part of the states' common law for many years. There is no greater need for uniformity in this field than in the many other fields where *Erie R. R. vs. Tompkins*, 304 U. S.

64, has created diversity even in the federal courts sitting in the various states. This Court has recently yielded to a state the determination of a question of title in the field of bankruptcy over which the federal courts are given exclusive jurisdiction.

> *Thompson vs. Magnolia Petroleum Co.*, 84 L. Ed. (Adv.) 624 (1940).

The petitioners in effect ask this Court to exercise coercion upon Ohio and other state courts to compel them to accept the New York definition of a "boycott" and a "labor dispute." This would be an invasion of the states' domain. This Court has said in *Erie R. R. vs. Tompkins, supra,*

> "Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such power upon the Federal courts."

Will this Court then assume the power to do by decision what it has denied Congress to do by legislation?

Ohio's rule of decision in cases of this character was stated as follows in *LaFrance Co. vs. Electrical Workers,* 108 O. S. 61, 95 (1923):

> "Equality of justice demands that in any controversy the rights of all parties be scrupulously maintained. The right of workmen to be employed, irrespective of union membership, must be maintained; the right of employer to conduct his business without illegal interference must be upheld; and legal means employed *by strikers* must not be curtailed. Among the latter are the right of peaceful picketing, the peaceful persuasion of employes to terminate contracts at will, and the peaceful persuasion of expectant employes not to accept work with the employer in question." (Emphasis ours.)

This doctrine was reaffirmed in *State ex rel. vs. State Office Building Commission,* 125 O. S. 301, and it was followed in the instant case.

This delimitation of the area of struggle by the Ohio Court cannot be fairly characterized as obsolete or as based upon antiquated principles especially in the face of the attitude of a majority of recent decisions on this question. A recent Maine case re-examined the authorities of all the other states, expressly refused to follow the New York cases, and adopted the one now selected by Ohio as the more equitable one.

Keith Theatre vs. Vachon, 134 Me. 392 (1936).

See also

Muncie Building Trades Council vs. Umbarger, 17 N. E. (2) 829 (Ind. 1938);

Simon vs. Schwachman, 18 N. E. (2d) 1 (Mass. 1938);

Adams vs. Building Service Employees International Union, 84 Pac. (2) 1021 (Wash. 1938).

And the changes recently made by the many states who had experimented with broad anti-injunction statutes indicate a similar attitude. See Ch. 57, Wisconsin Laws of 1939; Ch. 440, Minnesota laws of 1939; the initiative petition adopted at a general election in Oregon on November 8, 1938. Even as advanced a thinker on labor problems as Mr. Madden, the present chairman of the National Labor Relations Board, stated in a public address in October, 1937 as follows:

> "If the great labor organizations desire to increase their membership by having employers force their employees into them against the employees' will, they must first, by repeal or amendment, cut the heart out of the National Labor Relations Act. For no Board which can read English and understand the purpose of this law can ever hold, under the present law, that the employer can choose the union for his employees."

Labor Relations Reference Manual, Vol. 1-A, pages 920, 926.

In view of the foregoing it certainly cannot be said that the ruling of the Ohio court is arbitrary or unreasonable. We therefore respectfully submit that the petition for a writ of certiorari should be denied both for want of jurisdiction and because the question presented is not a substantial federal question but turns completely on a point of local law as to which, according to prior decisions of this Court, the state court's jurisdiction is paramount.

Respectfully submitted,

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